JUL 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-6633

In the Supreme Court of the United States

OCTOBER TERM, 1982

DANNY R. BEARDEN, PETITIONER,

v.

STATE OF GEORGIA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

JOINT APPENDIX

JAMES H. LOHR
428 McCallie Avenue
Chattanooga, TN 37402
(615) 756-5880
Counsel for Petitioner

GEORGE M. WEAVER
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Atlanta, Georgia 30334
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Counsel for Respondent

PETITION FOR CERTIORARI FILED MAY 3, 1982
CERTIORARI GRANTED JUNE 28, 1982

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No. 8917

SUPERIOR COURT

Catoosa County

September Term, 1980

THE STATE

-VS.-

DANNY BEARDEN

FELONY
INDICTMENT
for
BURGLARY

True BILL

Nora Robbs, *Foreman*

11th day of September, 1980

CATOOSA COUNTY, GA

FILED IN OFFICE

Sept 11 WILLIAM (BILL) CAMPBELL *District Attorney*

NORMAN L. STONE, *Clerk*

The Defendant Danny Bearden waives formal arraignment, copy Bill of Indictment, list of witnesses before the Grand Jury, and agrees to strike from a panel of Jurors and pleads guilty.

DANNY BEARDEN, *Defendant*

W. M. PHILLIPS, *Defendant's Attorney*

WILLIAM M. (BILL) CAMPBELL, *District Attorney*

A. B. BROOKS, *J. P.*

WITNESSES:

In addition to any persons named in the body of this instrument.

KEN HALE *Prosecutor*
C.C.S.O.

MARTHA KUNGERGER
Lot 8, Rt. 8
Hickory Grove Trlr. Park
Ringgold, GA

DONNA M. STEVENS
301 A, Inman St.
Ringgold, GA

NORMAN HANSEN
c/o Days Inn Motel
GA Hwys. 146 & I-75
Ringgold, GA

MRS. DANNY BEARDEN

GEORGE BROWN
C.C.S.O.

J. D. STEWART
HAROLD BRADFORD
A. B. BROOKS
C.C.S.O.

INDICTMENT

GEORGIA, CATOOSA COUNTY.

IN THE SUPERIOR COURT OF SAID COUNTY
THE GRAND JURORS SELECTED, CHOSEN AND SWORN FOR SAID COUNTY, TO-WIT:

1 NORA ROBBS *Foreman*	9 WILLIAM N. CHASE
2 MARTHA WATTS	10 EDITH B. LAND
3 STEVE LEMANS	11 KENNETH E. PARTON
4 DONALD L. ARMOUR	12 MARGARET HINSON
5 MALCOLM L. THOMPSON	13 BARBARA CANALES
6 WAYNE M. TEMPLETON	14 HERMAN N. WARTHER
7 SANDRA THOMAS	15 CHARLES E. THOMPSON
8 ALMA C. CALLAHAN	16 STEVE E. CHOATE

In the name and behalf of the citizens of Georgia, charge and accuse Danny Bearden with the offense of FELONY, for that the said Danny Bearden did on the 7th day of July in the year of our Lord Nineteen Hundred and Eighty in the County aforesaid, did unlawfully and without authority and with intent to commit a theft therein, enter the mobile home dwelling house of Martha Kungerger, the lawful occupant thereof, said mobile dwelling house being then and there located at Lot 8, Route 8, Hickory Grove Trailer Park, Ringgold, Catoosa County, Georgia, contrary to the laws of said State, the good order, peace and dignity thereof.

WILLIAM M. (BILL) CAMPBELL
District Attorney

IN THE SUPERIOR COURT FOR THE COUNTY OF CATOOSA
STATE OF GEORGIA

THE STATE OF GEORGIA

VS

DANNY BEARDEN

Case No. 8917
September Term, 1980
Offense: Burglary

ORDER OF COURT UNDER FIRST OFFENDER'S ACT

Filed October 8, 1980

The Defendant, Danny Bearden, having entered his plea of guilty in the above case and the Court, prior to an adjudication of guilt, finds that the Defendant has not been previously convicted of a felony, and the Court without entering a judgment of guilt against the Defendant, and with the consent of the Defendant, does hereby defer further proceedings in this case and places the Defendant on Probation as provided by the Statewide Probation Act (Sections 27-2702 through 27-2726.1), for a period of Three (3) years, upon payment of a fine of $500.00, and restitution in the amount of $50.00. Defendant shall pay $100.00 of said fine instanter and $100.00 of said fine on or before October 9, 1980. The remaining $350.00 of said fine and restitution shall be paid within Four (4) months of October 8, 1980. Upon violation of the terms of probation, or upon a conviction for another crime, the Court may enter an adjudication of guilt and proceed as provided by law.

Provided, however, that the said Defendant, during the term of this probation sentence shall report to the Probation Officer of this Lookout Mountain Judicial Circuit as may be directed by the Court or said Probation Officer, not to leave the jurisdiction of this Court without the permission of this Court, and shall drink no alcoholic beverages nor use any narcotics nor possess same and shall keep no

company with persons of bad reputation, avoid places of disreputable character, and visit no places where alcoholic beverages or drinks or narcotics are sold, and shall permit the Probation Officer to visit him (her) at home or elsewhere at any time, and shall work faithfully at suitable employment insofar as possible, and shall violate no penal laws of this State or any State of the federal government, or municipal ordinance as are herein specified, and as may from time to time be required by the Court or Probation Officer.

This Order is imposed pursuant to the provisions of Sections 27-2727 and 27-2728 of the Code of Georgia, Annotated.

FURTHER ORDERED that a copy of this Order be forwarded to the Office of the State Probation System and the Identification Section of the Federal Bureau of Investigation.

ENTERED, this 8th day of October, 1980.

/s/ _____
ROBERT E. COKER
Judge of the Superior Court
Lookout Mountain Judicial Circuit

We Hereby Consent to the Within Order.

/s/ _____
DANNY BEARDEN
Defendant

/s/ _____
WILLIAM M. PHILLIPS
Attorney for
Defendant

No. 8923

SUPERIOR COURT

Catoosa County

September Term, 1980

THE STATE

-VS.-

DANNY BEARDEN

FELONY
INDICTMENT
for
THEFT BY RECEIVING STOLEN PROPERTY

True BILL

NORA ROBBS *Foreman*

11th day of September, 1980

Catoosa County, GA.

Filed in Office

9/11 WILLIAM M. (BILL) CAMPBELL *District Attorney*

NORMAN L. STONE *Clerk*

The Defendant Danny Bearden waives formal arraignment, copy Bill of Indictment, list of witnesses before the Grand Jury, and agrees to strike from a panel of Jurors and pleads guilty.

DANNY BEARDEN *Defendant*

W. M. PHILLIPS *Defendant's Attorney*

WILLIAM M. (BILL) CAMPBELL, *District Attorney*

A. B. BROOKS *J.P.*

WITNESSES:

In addition to any persons named in the body of this instrument

KEN HALE *Prosecutor*
C.C.S.O.

STEVE PAUKERT, *Mngr.*
c/o Rodeway Inn
133 W. Burnside
Pocatello, Idaho 83201
(208) 237-0020

MARK SAUNDERS

JOSEPH LYNN ELLIS
32 Timber Ridge Trail
Ringgold, GA

DOUG JONES
c/o Days Inn Motel
GA Hwys. 146 & I-75
Ringgold, GA
891-9910

MIKE GARD
C.C.S.O.

INDICTMENT

GEORGIA, CATOOSA COUNTY.

**IN THE SUPERIOR COURT OF SAID COUNTY
THE GRAND JURORS SELECTED, CHOSEN AND SWORN
FOR SAID COUNTY, TO-WIT:**

1 NORA ROBLES *Foreman*	12 EDITH B. LAND
2 MARTHA WATTS	13 KENNETH E. PARTON
3 NEAL PINDLY	14 MICHAEL ZEIGLER
4 STEVE LEMANS	15 DONALD L. ARMOUR
5 ALMA C. CALLAHAN	16 BRENDA C. MCMILLEN
6 MALCOLM L. THOMPSON	17 PAMELA J. GRIFFIN
7 WAYNE M. TEMPLETON	18 SHEILA E. EDWARDS
8 SANDRA THOMAS	19 OPAL DENISE AHERN
9 BARBARA CANALES	20 CHARLIE E. THOMPSON
10 MARGARET HINSON	21 STEVE E. CHOATE
11 WILLIAM N. CHASE	22 HERMAN L. WARTHER

In the name and behalf of the citizens of Georgia, charge and accuse Danny Bearden with the offense of FELONY, for that the said Danny Bearden did on the 11th day of July in the year of our Lord Nineteen Hundred and Eighty in the County aforesaid, did unlawfully receive and retain stolen property, to wit: one (1) RCA VCR video recorder, model VBT 200, serial number 7384HM128, the property of Steve Paukert, with a value of $1,000.00, knowing said property was stolen, said property not having been received and retained with intent to restore it to the owner, contrary to the laws of said State, the good order, peace and dignity thereof.

WILLIAM M. (BILL) CAMPBELL
District Attorney

IN THE SUPERIOR COURT FOR THE COUNTY OF CATOOSA
STATE OF GEORGIA

THE STATE OF GEORGIA

VS

DANNY BEARDEN

CASE NO. 8923

SEPTEMBER TERM, 1980

OFFENSE: THEFT BY RECEIVING

ORDER OF COURT UNDER FIRST OFFENDER'S ACT

FILED OCTOBER 8, 1980

The Defendant, Danny Bearden, having entered his plea of guilty in the above case and the Court, prior to an adjudication of guilt, finds that the Defendant has not been previously convicted of a felony, and the Court without entering a judgment of guilt against the Defendant, and with the consent of the Defendant, does hereby defer further proceedings in this case and places the Defendant on Probation as provided by the Statewide Probation Act (Sections 27–2702 through 27–2726.1), for a period of One (1) year upon payment of restitution in the amount of $200.00, said $200.00 restitution shall be paid within Four (4) months of October 8, 1980. Upon violation of the terms of probation, or upon a conviction for another crime, the Court may enter an adjudication of guilt and proceed as provided by law.

Provided, however, that the said Defendant, during the term of this probation sentence shall report to the Probation Officer of this Lookout Mountain Judicial Circuit as may be directed by the Court or said Probation Officer, not to leave the jurisdiction of this Court without the permission of this Court, and shall drink no alcoholic beverages nor use any narcotics nor possess same and shall keep no company with persons of bad reputation, avoid places of disreputable character, and visit no places where alcoholic beverages or drinks or narcotics are sold, and shall permit

the Probation Officer to visit him (her) at home or elsewhere at any time, and shall work faithfully at suitable employment insofar as possible, and shall violate no penal laws of this State or any State of the federal government, or municipal ordinance and be of general good behavior, and shall observe such other conditions as are herein specified, and as may from time to time be required by the Court or Probation Officer.

This Order is imposed pursuant to the provisions of Sections 27–2727 and 27–2728 of the Code of Georgia, Annotated.

FURTHER ORDERED that a copy of this Order by forwarded to the Office of the State Probation System and the Identification Section of the Federal Bureau of Investigation.

ENTERED, this 8th day of October, 1980.

/s/ _____

ROBERT E. COKER
Judge of the Superior Court
Lookout Mountain Judicial Circuit

WE HEREBY CONSENT TO THE WITHIN ORDER.

/s/ _____

DANNY BEARDEN
Defendant

/s/ _____

WILLIAM M. PHILLIPS
Attorney for Defendant

PETITION FOR REVOCATION OF PROBATION
DEPARTMENT OF CORRECTIONS/OFFENDER REHABILITATION

800 PEACHTREE STREET, N.E.
ATLANTA, GEORGIA 30308

THE STATE

VS

DANNY RAY BEARDEN

No. 8923; 8917, September Term

1980, Superior Court

Of Catoosa County

Now comes D. L. Lomenick, District Attorney, in the name and behalf of the State of Georgia, and brings this action against Danny Ray Bearden, hereinafter called the Defendant, and shows:

I

That the Defendant entered a plea of guilty to the offense of Burglary and Theft by Receiving at the September Term, 1980.

II

That this Court, on the 8th day of October, 1980, did sentence the Defendant to serve as follows: Three years probation; one year concurrent; $500.00 fine and $250.00 restitution ($200.00 instanter and balance $550.00 on or before February 8, 1981).

III

That this Court, by proper order, however, permitted the Defendant to serve said sentence on probation, the terms and conditions of which are fully set forth in the copy of said sentence which is attached hereto, marked as Exhibit "A", and specifically incorporated herein.

IV

That the Defendant has violated the following terms and conditions of probation in the following particulars: Did unlawfully and without authority on the 10th day of May, 1981, enter the home of Lucy Haney, 103 Garden Road, in Ringgold, Catoosa County, Georgia, for the purpose of commiting a theft. Defendant has also failed and refused to pay fine and restitution balance of $550.00, which was to be paid on or before February 2, 1981.

V

WHEREFORE, the State of Georgia prays that the citation for revocation of probation be served on the Defendant and that the Defendant be directed to appear before this Court on a day to be fixed by the Court and at that time to show cause why probation should not be revoked.

This 27th day of April, 1981.

RALPH L. VAN PELS, JR.
Assistant District Attorney, Lookout Mountain Judicial Circuit

CATOOSA COUNTY, GA. FILED IN OFFICE
May 29, 1981
JANICE BENTON
Deputy Clerk

Order

Having read and considered the foregoing petition, it is hereby ordered that the Defendant be served with a copy of same and that the Defendant show cause before me on the 3rd day of June, 1981, at the Courthouse in Ringgold Georgia, at 1:00 P.M. why said probation should not be revoked.

This 29th day of May, 1981.

Filed in office
May 29, 1981
/s/ JANICE BENTON,
Deputy Clerk

GEORGE D. ANDRE
Judge, Lookout Mountain Judicial Circuit

CERTIFICATE OF SERVICE
(Omitted in Printing)

IN THE SUPERIOR COURT OF CATOOSA COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

VS.

DANNY BEARDEN

INDICTMENT NUMBERS:
8917, 8923
Burglary, Theft by Receiving

ORDER

Filed June 25, 1981

The above case having come on to be heard by this Court on the State's Petition for Revocation of Probation of March 3, 1981, and after hearing evidence and the arguments of counsel, and after considering and assessing the credibility of each and all of the witnesses who testified, this Court finds as follows:

1.

This Court hereby finds as a matter of fact, from a preponderance of the evidence produced at the above hearing, as follows:

A.

That on October 8, 1980, the defendant entered pleas of guilty under the First Offender's Act to each of the above felony indictments alleging burglary and theft by receiving.

B

That the defendant was represented by counsel at the time said pleas were entered and that the pleas were knowingly and voluntarily entered.

C

That based on those pleas, the Court sentenced the defendant to serve a term of three (3) years under the First

Offender's Act as to Indictment Number 8917, conditioned upon payment of a $500.00 fine, and $50.00 restitution, to be paid within four (4) months of the date of sentencing. Defendant was further sentenced to serve a term of one (1) year under the First Offender's Act as to Indictment Number 8923, conditioned upon payment of $200.00 restitution, also to be paid within four (4) months of the date the sentence was imposed.

D.

That as of the date of the above hearing on June 3, 1981, the defendant had paid only $200.00 toward the $750.00 total of fines and restitution which he had been ordered to pay by February 8, 1981, as a condition of his probation.

E

That the defendant had also failed to report to his probation officer as directed.

2.

This Court further finds as a matter of law that the failure to pay fines and restitution ordered and failure to report constituted a violation of the express terms and conditions of the defendant's sentence of probation under the First Offender's Act entered on October 8, 1980.

3.

It is therefore ORDERED that the defendant's sentence of probation under the First Offender's Act be revoked and the defendant is remanded to the custody of the Director of the Department of Offender Rehabilitation for execution of the sentence entered pursuant to the First Offender's Act.

This 11th day of June, 1981.

JOSEPH E. LOGGINS
Judge, Superior Court
Lookout Mountain Judicial Circuit

SENTENCE

THE STATE

VS.

DANNY BEARDEN

No. 8917

Catoosa Superior Court

DETERMINATE SENTENCE

Term Five (5) Years

Offense Burglary

Plea: Not Guilty First Offender/Revocation Guilty

WHEREUPON, IT IS ORDERED AND ADJUDGED BY THE COURT:

That the Defendant serve the full term of 5 (years) in the Penitentiary or such other institution as the Director of the State Board of Corrections may direct, to be computed as provided by law. Said Sentence to run CONCURRENTLY—CONSECUTIVELY to ____.

This 3d day of June, 1981.

District Attorney
DAVID L. LOMENICK, JR.

JOSEPH E. LOGGINS
Judge, Superior Court,
Lookout Mountain Judicial Circuit

SENTENCE

THE STATE

VS.

DANNY BEARDEN

No. 8923

Catoosa Superior Court

DETERMINATE SENTENCE

Term Three (3) Years
Offense Theft by Receiving

Plea: Not Guilty First Offender/Revocation Guilty

WHEREUPON, IT IS ORDERED AND ADJUDGED BY THE COURT:

That the Defendent serve the full term of 3 (years) in the Penitentiary or such other institution as the Director of the State Board of Corrections may direct, to be computed as provided by law. Said sentence to run CONCURRENTLY to #8917 (Burglary).

This 3d day of June, 1981.
District Attorney
WM. M. CAMPBELL

JOSEPH E. LOGGINS
Judge, Superior Court,
Lookout Mountain Judicial Circuit

IN THE SUPERIOR COURT OF CATOOSA COUNTY
STATE OF GEORGIA

STATE OF GEORGIA, PLAINTIFF

VS

DANNY BEARDEN, DEFENDANT

Criminal Action

NOS: 8917 and 8923

ORDER

September 17, 1981

The Defendant's Motion to Modify Sentence in the above cases having come to be heard by this Court on the 9th day of September, 1981, and it appearing upon a hearing of said motion that the record of these cases does not show that the Defendant was properly instructed as to the possible results of the revocation of his probation at the time the Defendant entered his pleas of guilty under the First Offenders Act on October 8, 1980.

IT IS THEREFORE ORDERED that the Defendant's sentences as entered by this Court on the 3rd day of June, 1981, are hereby modified and amended as follows: The Defendant shall serve the remaining time of his probation as specified in the Court orders entered in the above cases and dated the 8th day of October, 1980, in the penitentiary or such other institutions the Director of the State Board of Corrections may direct, to be computed as provided by law.

This the 17th day of September, 1981.

JOSEPH E. LOGGINS
Judge, Superior Court
Lookout Mountain Judicial Circuit

IN THE COURT OF APPEALS OF GEORGIA

OPINION

FEB 24, 1982
62930.

BEARDEN

VS

THE STATE

P–209

POPE, JUDGE.

Danny Ray Bearden appeals the revocation of his probation. He enumerates as error the revocation of his probation on a ground not asserted in the petition to revoke his probation. He also enumerates a violation of the Constitution in the trial court's revocation of his probation on the ground that he had failed to pay the fine and restitution assessed.

On October 8, 1980 appellant pled guilty to the offenses of theft by receiving stolen property and burglary. He was placed on probation as a first offender pursuant to Code Ann. § 27–2727. For the offense of theft by receiving stolen property, he was required to serve one year on probation upon payment of $200.00 restitution, said restitution to be paid within four months of October 8, 1980. For the offense of burglary he was required to serve three years on probation upon payment of a fine of $500.00 and restitution in the amount of $50.00; appellant was required to pay $200.00 of the fine almost immediately and $350.00 comprising fine and restitution within four months of October 8, 1980. The state moved on May 27, 1981 to revoke appellant's probation on the grounds that he had committed a burglary on May 10, 1981 and also that he had failed to pay the $550.00 balance of the foregoing fine and restitution. Following a hearing on the petition on June 3, 1981, the trial court found that appellant had not paid the required fine and restitution and also found that appellant had failed to report to

his probation officer as directed." The trial court revoked appellant's probation and sentenced him to concurrently serve five years for the offense of burglary and three years for the offense of theft by receiving stolen property.

1. Appellant testified during the course of his revocation hearing that he was unemployed and could not pay any portion of the $550.00 balance of the fine and restitution. "This testimony provided an adequate basis for the trial court's order revoking appellant's probation. 'Only slight evidence is required to authorize revocation, (cit.) and where there is even slight evidence of misconduct, the appellate court will not interfere with revocation unless there has been manifest abuse of discretion. (Cits.)' *Boston v. State*, 128 Ga. App. 576 (197 SE2d 504) (1973). Thus, even assuming that the record supported appellant's contention that the trial court based its revocation order in part upon his [failure to regularly report to his probation officer], no notice of which ground was provided to him prior to the revocation hearing, the order of the trial court revoking his probation will nevertheless be upheld because it rests alternatively upon the independent determination by the court that appellant violated yet another of the conditions of his probation." *Simmons v. State*, 156 Ga. App. 336, 337 (274 SE2d 726) (1980); see also *Simpson v. State*, 154 Ga. App. 775 (2) (270 SE2d 50) (1980), vacated on other grounds, Simpson v. Georgia, 450 U.S. 972 (101 SC 1504, 67 LE2d 808) (1981). Compare *Radcliff v. State*, 134 Ga. App. 244 (214 SE2d 179) (1975).

2. Appellant contends that because he was indigent the revocation of his probation for failure to pay the required fine and restitution violates the Equal Protection Clause of the 14th Amendment of the United States Constitution. This contention has been decided adversely to appellant in *Hunter v. Dean*, 240 Ga. 214 (239 SE2d 791) (1977); *Calhoun v. Couch*, 232 Ga. 467 (207 SE2d 455) (1974); but see Wood v. Georgia, 450 U.S. 261, 284–287 (101 SC 1097, 67 LE2d 220) (1981) (White, J., dissenting). We see no basis for distinguishing this case, where appellant was placed on probation as a first offender pursuant to Code Ann. § 27–2727, from the foregoing cases, where the appellants

were apparently not entitled to first offender status and were placed on probation pursuant to Code Ann. § 27–2709. Code Ann. § 27–2727 provides that upon violation of the terms of probation, the trial court is authorized to enter an adjudication of guilt and "proceed as otherwise provided" under the Statewide Probation Act, Code Ann. § 27–2702 et seq. No matter under which provision of the Act probation is given, a criminal defendant is subject to revocation of his probation if he is found to have violated the conditions thereof.

Judgment affirmed. Quillian, C. J., and McMurray, P. J., concur.

[1] **IN THE SUPERIOR COURT OF CATOOSA COUNTY, GEORGIA**
AT RINGGOLD

STATE OF GEORGIA, PLAINTIFF,

-VS-

DANNY BEARDEN, DEFENDANT.

CRIMINAL ACTION
NOS. 8917 & 8923

APPEARANCES:

FOR THE STATE OF GEORGIA:
RALPH VAN PELT, *Esq.*,
Assistant District Attorney.

FOR THE DEFENDANT:
JAMES H. LOHR, *Esq., of*
Hatfield, McColpin, Morgan,
Van Cleave & Stulce, Esqrs.,
416 Battlefield Parkway,
Fort Oglethorpe, Georgia 30741

June 3, 1981

TRANSCRIPT OF PROCEEDINGS

[2] BE IT REMEMBERED, the above-entitled cause came on for hearing on the 3rd day of June, 1981, before the Honorable Joseph E. Loggins, Judge of the Superior Courts, Lookout Mountain Judicial Circuit, when the following proceedings were had, and evidence introduced, to-wit:

MR. VAN PELT: This is a probation revocation, State versus Danny Bearden, in reference to No. 8917, felony indictment for burglary, 8923, a felony indictment for theft by receiving stolen property.

Mr. Bearden is being represented by Mr. Lohr in this case, Your Honor.

THE COURT: All right.

MR. LOHR: Your honor, one preliminary matter, here. I talked with Mr. Van Pelt, and we're willing to stipulate

that there has been fingerprints taken, and that there is alleged here that Mr. Bearden burglarized a trailer over on Garden Road in Ringgold. That's the basis, one of the basis for the revocation.

The results from these fingerprint analysis has not come back from the lab, and I would like to request this Court—move this Court to continue this hearing until such time as we may get the report on the fingerprint analysis.

I have reason to believe that it may be [3] exculpatory in this matter.

THE COURT: When were the fingerprints sent to the Crime Laboratory?

MR. VAN PELT: It's been—do you remember what day it was Ken took those down there, Chief? It's been a couple of three weeks, Your Honor.

What was sent were copies of Mr. Bearden's prints and some items from the trailer that were sent. That may or may not be dispositive.

It's entirely possible that they wouldn't be able to lift a latent print from any of the items that were sent. We have some—

THE COURT: (Interposing) Are you relying upon the results of the test as to that alleged crime?

MR. VAN PELT: No, sir, not at this hearing. We're not relying on them for the basis of the revocation, no, sir.

MR. LOHR: Your Honor, I think it's pretty well established the identity of three individuals that were in that trailer. The fourth individual, I think, the dispute is over. The dispute is over who the fourth individual was in that trailer.

It would be conflicting testimony on that matter.

The reason I'm interested in those prints is to find out if in fact there are prints from the fourth [4] person, not the three that I believe will be established as being in that trailer, and whether or not the prints from those—that fourth person would be Danny Bearden or some other individual. But, at this point—

THE COURT: (Interposing) But, supposing, Mr. Lohr, it comes back that there were 15 other people in that trailer, none of whom were the defendant in the case.

Are you saying that that would be the defense in the case, that this defendant didn't enter the trailer?

MR. LOHR: Yes, yes, that is the defense, Your Honor.

THE COURT: You're saying, if the defendant did in fact enter the trailer, then his fingerprints would be in the trailer on these items that were dusted, and the fingerprints taken?

MR. LOHR: I'm not saying that if he was in the trailer not necessarily will his fingerprints show. I agree to that point. The point is there may be prints of a fourth individual, I believe it will be established probably that there were four individuals in that trailer, three individuals I think the identity will not be in dispute, the fourth individual—Mr. Bearden is accused of being that fourth individual.

[5] The defense, I believe, he was not in the trailer, and if in fact there are prints from another individual, not these three, and not Mr. Bearden, I believe that establishes, tends to establish that Mr. Bearden was, in fact, not in the trailer.

I would just like to see the results of this test before we go on with this hearing. That's basically—

MR. VAN PELT: (Interposing) Your Honor, we have a second ground alleged in addition to the burglary.

THE COURT: I understand that, but let's stay on the fingerprint subject for the time being.

I may be wrong, but I've known a lot of cases where the defendant did in fact enter the building, but his fingerprints couldn't be found in that building.

Now, Mr. Lohr, as to these other three defendants, you say there's no question as to the identity of those three? Is that based upon fingerprints?

MR. LOHR: Well, to my knowledge, not at this point.

I believe, this is just based upon my investigation up to this point, what I believe to be. I think that's important evidence, the fingerprints.

THE COURT: I think it's important evidence if in fact they have fingerprints.

What you're—what seems to me that your [6] argument is the negative, and that is that if there are no fingerprints found inside the trailer, then the defendant wasn't in

that trailer, and your theory is, that if, if the defendant entered the trailer, then his fingerprints would have been found, and the Crime Lab report would show that it was his fingerprints; is that right?

MR. LOHR: No. I can—my theory is that there were four people in the trailer, Mr. Bearden was not one of them.

I wouldn't be surprised if the Crime Lab showed prints from four individuals, and that Mr. Bearden's prints will not be among those.

You see, it's the fact that there were four individuals, that there are four different sets of prints that show up, and none of those are Mr. Bearden's, and I think if that were established, that would be exculpatory in this matter.

THE COURT: I think it would be exculpatory and it could be used, but unless the State is relying on, as a part of their case here, on the fingerprints to go forward with this case, then I don't see how a continuance is necessary in this case.

MR. LOHR: It's just evidence that we don't have at this time, Your Honor. We're not able to obtain [7] at this time, which we would be able to obtain upon request once the State receives the results from this lab test.

I would very much like to have that evidence available before we go ahead with this, at least this portion of the hearing.

THE COURT: If Mr. Van Pelt has stated that he is not relying on that evidence at all in this hearing, then how would it be material to this hearing if there's no evidence submitted on that point?

MR. LOHR: We have a defense to put on. It could very well be that we would want to use that evidence in the defense.

THE COURT: As to this hearing?

MR. LOHR: As to this hearing.

THE COURT: If Mr. Van Pelt is not going to use it, how can you use it as a defense?

MR. LOHR: Can't I subpoena the individuals from the Crime Lab?

THE COURT: You can anybody you want to.

MR. LOHR: I mean, that would be, that would be what I intend to do if in fact it was favorable for the defendant.

THE COURT: In any event, the Court is going to deny your request for a continuance.

[8] Now, at such time as the State attempts in any way to use this alleged burglary for which the fingerprints would be important to you, then the Court will take it under consideration again, and might change the ruling.

MR. LOHR: With respect to this particular hearing? I understand, if I understand you correctly, that if the State relies on the basis of the burglary for the revocation, that at that time the Court will—

THE COURT: (Interposing) I will reconsider it, yes, sir.

MR. LOHR: Okay. Thank you.

MR. VAN PELT: Very well. We'll, Your Honor, in that case, we'll confine ourselves to the second ground of the revocation.

THE COURT: All right.

MR. VAN PELT: Okay. First, Your Honor, I would like to submit—the first piece of evidence I would like to submit, S-1. It's already marked as S-1.

THE COURT: Have you shown it to defense counsel?

MR. VAN PELT: Yes, Your Honor, that's a certified copy of plea and sentence in both cases, and I believe the, the Clerk's copy of the petition shows the defendant was served with a copy of those along with a copy of the petition.

[9] MR. LOHR: No objection.

THE COURT: All right. Let State's Exhibit 1 be admitted.

(Whereupon, the document referred to above as State's Exhibit No. 1 was received into evidence.)

MR. VAN PELT: Your Honor, I would like to call to the Court's attention that both of these are first offender sentences in both cases.

THE COURT: All right. Proceed.

MR. VAN PELT: State would call Mr. Mullis. Would you raise your right hand. Do you swear that the testimony you are about to give in this case before the Court is the truth, the whole truth and nothing but the truth, so help you God?

JACK MULLIS,

called as a witness at the instance of the State of Georgia, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VAN PELT:

Q For the record, would you state your full name and how you are employed?

A I'm Jack Mullis, and I'm the Probation Officer for the Lookout Mountain Judicial Circuit.

Q And then, what are your duties with the Probation [10] Office?

A Duties for the Probation Office is to supervise and collect fines and restitutions that a person is ordered to pay through our office.

Q Do you supervise and collect fines?

A Yes, sir.

Q And supervise the collection of fines in Catoosa County?

A Yes, sir.

Q And in particular, do you supervise Danny Bearden?

A Danny Bearden is on my case load, yes.

Q And pursuant to a sentence of the Court in this case, do you have any knowledge as to whether or not Mr. Bearden was ordered to pay a fine?

A Yes. He was ordered to pay a fine.

Q Do you know how much the amount of that fine was in each of the cases?

A He paid, it was $500 fine, and $200—$250 restitution, and he was ordered by the Court to pay a $200 instanter, which he did, and that's all he's paid, and he was to have this paid by February the 8th, 1981.

Q Okay. So, to your knowledge, and as far as you know, what the records of the Clerk of the Court reflect is that—

A (Interposing) He has not paid that.

Q (Continuing)—he has not paid. He has paid $200?

[11] A Yes.

Q But, has not paid anything above and beyond that?

A No.

Q Have you ever had any contact with Mr. Bearden regarding his—

A (Interposing) I'm sure that he has written letters, because we get out letters every so often about the fine and restitution and stuff like that.

Q Has he contacted you in any effort to explain why he has not been able to pay the fine?

A I don't know of any time that he has.

Q To your knowledge?

A To my knowledge.

Q To your knowledge. Do you have any knowledge of whether or not he's contacted anyone in your office?

A No, I don't. All I know is, what I can tell is that anyone that is ordered by the Judge to pay a restitution and a fine by a certain date, after that date we're—we can issue a warrant after that date because they have been given plenty of ample time to pay that.

Q Okay. What time is reflected on the documents there in front of you? When was Mr. Bearden to have completed paying his fine by?

A He was to have completed that by February the 8th, 1981.

[12] Q And today's date is June the 3rd?

A This is June, so he's had plenty of time to pay it. Whether we—whether we get in touch with them or write them or anything else about their fine, they know that, it is explained to them when they're put on probation when the fine is due, and that's when it's to be paid, on or before that time, and we usually give them a little extra time to, you know, pay it on time.

Q Do you know if Mr. Bearden was aware that you were his probation officer?

A Yes. When he's written up and put on probation, they are explained, these rules, by the probation officer.

Q Okay.

MR. VAN PELT: No further questions.

THE COURT: Mr. Lohr?

CROSS EXAMINATION

BY MR. LOHR:

Q You say that $200 was paid, was paid immediately?

A Yes.

Q Do you know who paid that amount?

A No, I don't. The Clerk's Office gets a receipt for it, and it's attached to the case. The receipt is attached to the case.

Q In fact, wasn't the Court order that Mr. Bearden pay $100 immediately, and $100 on the next day?

[13] A Well, I don't know till I review this thing. It could have been. I have so many. I couldn't tell you exactly. It could have been that way.

Q Sentence was entered on the 8th day of October; is that correct?

A October the 8th, 1980, was when the sentence was. Three years probation, one year concurrent, five hundred dollar fine, $250 restitution, a $200 instanter, and a balance $550 on or before February the 8th.

Now, I don't have a copy of the sentence here, but whatever the sentence reads, that's the way it is.

MR. LOHR: And, Your Honor, for the record, I would like to state that my copy of the sentence on Case No. 8917 states, defendant shall pay $100 of said fine instanter, and $100 of said fine on or before October 9, 1980.

THE COURT: All right. So noted. Proceed.

BY MR. LOHR:

Q You say that your office has sent letters to Mr. Bearden?

A I said it's the usual procedure that we do.

Q Do you know whether or not—

A (Interposing) No, I don't right offhand know whether I sent him a letter or not, but it's our procedure that we do.

[14] Q Do you know whether or not—or, excuse me—have you had any personal contact with Mr. Bearden since October 9?

A Probably. I don't have my case—my book with me, but probably I have, because I usually get in touch with him.

Q In fact, you cannot testify positively that you have notified Mr. Bearden?

A No. I couldn't tell you positively. I do know that he knew that he owed the fine.

Q And to your knowledge, Mr. Bearden has not contacted you or your office during this period?

A To my knowledge. I'm not saying he hasn't. He might have called and the secretary might have talked to him or something.

Q Did you issue a warrant for his arrest for violation of the probation?

A Failure to pay, yes.

Q When was that warrant issued?

A Tenth day of May, 1981. No, nineteen—right offhand, I don't know, I would have to see the warrant. I can't recollect when I issued—I don't have the warrant here.

Q Was the basis for that—

A (Interposing) But, I give him ample time, I always do, and I issued the warrant for failure to pay as directed [15] by the Court.

Now, that was after February the 8th, 1981.

Q And you did issue a warrant on that basis?

A Yes.

MR. LOHR: I have no further questions at this time.

THE COURT: All right. Anything further, Mr. Van Pelt?

REDIRECT EXAMINATION

BY MR. VAN PELT:

Q Okay. Mr. Mullis, the dates Mr. Lohr was talking about there in the sentence, he's talking about October 8th, then October 9th, when the second $100 was paid. That's the very next day?

A Oh, yeah.

Q That was to be paid, and he did pay the second $100?

A Yeah, he paid that. He paid $200.

Q And he's not paid anything since?

A No, nothing since.

Q And to your knowledge, that's what's reflected in the record of the Clerk of the Court?

A Yes.

MR. VAN PELT: No further questions.

THE COURT: All right, sir, you can step down.

MR. LOHR: Just one question, Your Honor.

[16] RECROSS EXAMINATION

BY MR. LOHR:

Q Do you know whether Danny Bearden or some other person paid this $200?

A No, I don't. I don't know who paid it.

THE COURT: All right. Step down.

(Witness excused.)

THE COURT: Anything further from the State?

MR. VAN PELT: No, Your Honor.

THE COURT: Mr. Lohr?

MR. LOHR: Your Honor, at this time I would like to call Mrs. Jean Bearden.

THE COURT: Are there any other witnesses other than the defendant himself? He may or may not testify. Do you have any other witnesses here, Mr. Lohr, to testify?

MR. LOHR: I have some, but the only other witnesses I have would go to the burglary charge which I understand that the State has—

THE COURT: (Interposing) Gentlemen, let me say this, there was no request for the rule of sequestration to be invoked.

MR. VAN PELT: No, sir.

MR. LOHR: Did not request.

THE COURT: I don't plan to make a practice of [17] calling witnesses from the courtroom to testify, but inasmuch as the rule was not asked for and invoked in this hearing, witnesses may appear that have sat here and listened to this testimony.

But, I don't plan to make a practice of permitting witnesses to testify who have sat in the courtroom and heard other testimony. So, just keep that in mind.

Go ahead and take the witness stand.

MR. LOHR: Raise your right hand, please.

THE COURT: I think they do it on television, don't they, just call them out of the audience and say, come on up here and testify, but we're not on TV, I hope.

MR. LOHR: Do you swear this testimony — evidence that you give in this case will be the truth, the whole truth and nothing but the truth?

Please be seated.

JEAN LILLIAN BEARDEN,

called as a witness at the instance of the defendant, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LOHR:

Q Would you please state your name for the Court, please?

[18] A Jean Lillian Bearden.

Q And how are you related to the defendant, Danny Bearden?

A I'm his wife.

Q Mrs. Bearden, have you and Mr. Bearden been living together and residing together since October of last year?

A We did up until January.

Q And has your husband, Mr. Bearden, been employed during that period of time?

A No, sir, he couldn't find no job.

Q Do you and Mr. Bearden own any property jointly?

A No, sir.

Q Does Mr. Bearden own any property to your knowledge?

A None as I know of.

Q Has Mr. Bearden been able to make any payment on the fine or restitution other than the $200 which was paid?

A No, sir. He was working at Rockwell International. He got laid off, and he hasn't been able to find a job since then.

Q To your knowledge, has he attempted to find a job?

A Yes. I have took him to look for jobs myself. I took him to Dalton Unemployment Office, and they didn't have

nothing, and he went to look for different jobs. He has been everywhere in Ringgold to find a job, and nobody's hiring.

MR. LOHR: No further questions.

[19] THE COURT: All right. Mr. Van Pelt?

CROSS EXAMINATION

BY MR. VAN PELT:

Q When was he laid off from Rockwell?

A It was in November, I believe.

Q November?

A Uh-huh.

Q Last year?

A Yes, sir.

Q Okay. Now, he was—you all were married in October, 1980?

A No. We've been married since August of '76.

Q August of '76?

A Uh-huh.

Q And you knew about when Mr. Bearden came to court on these charges in October?

A Uh-huh. I was with him then.

Q And you knew he had—part of his sentence there was that he had to pay a fine?

A Yes, sir.

Q And you knew that?

A Yes, sir.

Q And you knew, also knew that he had a certain amount of time to pay it in; isn't that true?

A The only thing that his papers said when we got it was [20] he had to pay $500. It didn't say what date or nothing on it.

Q You never—what papers?

A His probation papers.

Q Probation papers?

A Uh-huh.

Q You're saying didn't have—

A (Interposing) No definite time on it, just said pay $500.

Q Okay. And you're saying that he's attempted to find work since?

A Yes, sir.

Q He was laid off by Rockwell?

A Yes, sir.

Q Did you try and—have you gotten in touch with anybody in the Probation Office to tell them that he was making an effort to get some money up?

A No, sir. He has been down there a couple of times, and he told them then that he hadn't had no job, but he was looking for one.

Q Where is—where has he looked?

A He's looked in Dalton, all over Dalton carpet mills down there. He went to Babb Lumber Company, Salem Carpet, Dixie Yarn, every place in Ringgold he could think of to go to, but he still hasn't found one.

[21] Q Are you all living together now?

A Not since he's been picked up.

Q I mean before he was arrested?

A No.

Q You weren't?

A No.

Q Were you in the process of getting a divorce?

A No, sir. We was in the process of getting back together till they come picked him up again.

Q I see. The amount that Mr. Bearden paid when he was sentenced back in October, do you know where he got that money?

A Yes, sir. He borrowed it from his mother and father.

Q Has he made any attempts to get any more money from—

A (Interposing) They're like us. They don't have the money either. His father is a retired veteran. He's disabled, and his mother, she has to stay home and take care of him.

Q How does Mr. Bearden get around? Do you all have a car?

A They have a truck.

Q Who's they?

A His mother and father.

Q Does he use it?

A Yes, sir.

[22] Q Does he have any other way of getting to work?

A No, sir.

Q When you all were living together, where did you live? With his parents?

A No, with my mother and father.

Q Your mother and father?

A Uh-huh.

Q Okay.

MR. VAN PELT: I don't have anything further, Judge.

THE COURT: Anything further, Mr. Lohr?

MR. LOHR: Not of this witness, Your Honor.

THE COURT: All right. You can step down.

(Witness excused.)

MR. LOHR: Your Honor, at this time, we would call Mr. Bearden.

Will you raise your right hand, please?

Do you swear that the testimony that you give in this case will be the truth, the whole truth and nothing but the truth? Please be seated.

DANNY BEARDEN,

a defendant, called as a witness in his own behalf, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[23] BY MR. LOHR:

Q Will you state your name for the Court?

A Danny Bearden.

Q And Mr. Bearden, referring to the sentence and the order to pay the fine on that first offender, first offender act, how much has been paid toward that?

A Two hundred dollars.

Q And who paid that $200?

A My father and mother.

Q And have you made any payments since that time?

A No, sir.

Q Why not?

A Cause I haven't had a job.

Q And what efforts have you made? Would you just please tell the Court what efforts you've made to try and find a job?

A A lot. I've walked a lot, too, to find one, and then my mother and dad came to Dalton out at Textile Rubber, and—

Q (Interposing) What placed have you applied at?

A Textile Rubber and Con Agra, and over at the high school, I tried over there.

Q Which high school is that?

A One on the main drag there in Dalton at the end of Dalton.

Q And have you applied for any jobs in this area, [24] Ringgold?

A Yes, sir.

Q Where?

A Salem Carpet. They wouldn't even let me in the gate over there, just said they wasn't doing no hiring.

Q Any other places?

A Yes, sir. I went over here at Georgia Unemployment Office, and they didn't have any—they told me to come back in a couple of weeks.

Q And have you received an offer for employment from any of these?

A No, sir.

Q Places that you've applied?

A I've called Textile Rubber every day.

Q And what has been the result of your contact with the Unemployment Office?

A Don't need nobody.

Q Have you been receiving any unemployment checks?

A No, sir.

Q Have you been receiving any income whatsoever?

A No, sir.

Q Where have you been living since—from the time, from October of last year until you were arrested?

A At my mother's.

Q Do you own any property? Automobile?

[25] A No, sir.

Q Land?

A No, sir.

Q Anything of any value?

A No, sir.

Q Mr. Bearden, is there any way that you can pay this fine—that you could have paid this fine in the past?

A No, sir.

Q Have you attempted to contact the Probation Officer or his office with respect to this matter?

A I've called the secretary, and she said that he was out in Trenton.

Q Did you lave a message?

A I told them that I was going to be late, I'm trying to find a job and get a payment up.

Q And what was their response?

A They said we would tell them.

Q Have you received any letters or any other contact from the Probation Office?

A No, sir.

Q Not received any letters?

A No, sir.

Q Have you spoken with Mr. Mullis since the date of your sentence on October 8th, 1980?

A I've been in his office once down there when I was in [26] LaFayette.

Q Excuse me?

A I went in his office in LaFayette down there. It was, I think, a week after that when I got put on probation, I was supposed to went down there and got my papers and everything.

Q Did you receive your papers?

A Yes, sir.

Q Was it explained to you when and how you were to make your payments?

A Well, I can't read, and I can't hardly see. So, my wife read them to me.

MR. LOHR: I have no further questions.

THE COURT: Mr. Van Pelt?

CROSS EXAMINATION

BY MR. VAN PELT:

Q Thank you. Mr. Bearden, back in October, Judge Coker read, pronounced sentence he was imposing on you, didn't he?

A Yes, sir.

Q And he told you that you were going to have to pay a $100 that day, and $200 by the next day?

A Yes, sir.

Q And he also told you you were going to have to pay the rest of it within four months?

A Yes, sir.

Q You were represented by Mel Phillips then, weren't you?

[27] A Yeah.

Q All right. Now, when you sent to see Mr. Mullis to get your papers down there, were you—and at the time the sentence was imposed—were you employed then?

A No, sir.

Q Where were you living then?

A At my mother-in-law's.

Q Where were you living before you were arrested on this probation warrant?

A At my mother's.

Q At your mother's?

A Yes, sir.

Q And how long have you been living with your mother?

A With my mother?

Q Right.

A I don't know, about six months.

Q Six months?

A Yeah. Maybe less.

Q When did you move from your mother-in-law's to your mother's?

A When me and my wife separated.

Q And when was that?

A I don't know, really. I don't know what date it was.

Q Can you guess about how many months ago it was?

A Four, maybe five.

[28] Q Four or five months ago?

A (Witness nods head up and down.)

Q Which would make it about January, end of January, early February?

A It was at the last of the month.

Q End of January or end of February?

A I don't know.

Q Now, you mentioned about five places you went hunting for work, that's five places in the last, let's see, five, eight months?

A No, sir. I went other places. I called Rockwell about—they sent me a letter.

Q What did they say?

A To put my application in back up there in case they started rehiring.

Q All right. And you went to Conger (phonetically)? What was that?

A Joe Willard.

Q One of the other places you mentioned, what was it, Conger?

A Con Agra.

Q Con Agra. Where are they at?

A Dalton.

Q Dalton, And you went to the Dalton High School?

A Yes, sir. I went to Kayo, too.

[29] Q Went to where?

A Kayo on 41.

Q Who did you talk to at the Dalton High School?

A It was the superintendent.

Q Superintendent?

A Yes, sir.

Q Who did you talk to at Salem?

A I never did get in Salem. They wouldn't let me in. They wasn't taking no applications. They wasn't doing any hiring.

Q How many times have you been to the Unemployment Office?

A I went twice in one day.

Q When was that?

A About the 4th of this month.

Q When you entered your plea before Judge Coker, you knew you were going to have to pay that money, didn't you?

A Yes, sir.

Q You agreed to pay it?

A Yes, sir.

Q Did you have any intention of paying?

A Yes, sir. I was going to pay it.

Q Have you made any effort to contact Mr. Mullis since February, since the time you had ran out, to tell him?

A Well, the day when it ran out is the day when I called down there.

[30] Q It was. And you talked to the secretary?

A Yes, sir.

Q And she said he was in Trenton?

A She said she would get in touch with him. I might have assumed he was in Trenton because they was having court down there.

Q How did you know that?

A Because I just left Trenton.

Q Pardon?

A I just left Trenton.

Q You had just left Trenton. And then, you didn't make any other effort to get in touch with him?

A No, sir.

Q He told you when you got your papers that he was over here every Wednesday, didn't he?

A Yes, sir.

Q Did you come—have you ever been by the courthouse since that phone call in February to try and get in touch with him?

A No, sir.

Q Not made any attempt to come by here?

A No, sir.

Q On any other Wednesday he's here?

A No, sir.

Q And he's here every Wednesday?

[31] A I understood that Mr. Snow was down here, too, on Wednesday.

Q Right. Mr. Snow or Mr. Mullis or someone from the Probation Office is here in the courthouse, they told you that, didn't they?

A Yes, sir.

Q And you didn't attempt to come by the courthouse and find any of them?

A No, sir.

Q How do you survive, Mr. Bearden?

A I stay with my mother and them.

Q And they feed you?

A Till I find a job.

Q How long, just how long have you been unemployed?

A Since I got laid off at Rockwell.

Q When was that again?

A About—it was in November, it was right before Christmas.

Q Of nineteen . . .

A Eighty.

Q Have you been through high school?

A No, sir.

Q What was the last grade you attended?

A Ninth.

Q Okay. Are you disabled in any way?

[32] A No, sir.

MR. VAN PELT: No further questions, Your Honor.

THE COURT: All right. Anything further, Mr. Lohr?

REDIRECT EXAMINATION

BY MR. LOHR:

Q Mr. Bearden, have you been able to afford to hire a lawyer to represent you?

A No, sir.

Q Have I been appointed by the Court?

A Yes, sir.

THE COURT: You may step down.

THE WITNESS: Okay.

(Witness excused.)

THE COURT: Anything further?

MR. LOHR: No further witnesses, Your Honor.

THE COURT: Anything in rebuttal?

MR. VAN PELT: Nothing, Your Honor.

MR. LOHR: Your Honor, I just would like to bring a couple of things to the Court's attention before—

THE COURT: (Interposing) Something that's been presented?

MR. LOHR: Just argument. That's all.

THE COURT: I'll hear from you very, very briefly, but it will be briefly.

[33] (Whereupon, counsel for the State of Georgia and counsel for the defendant made closing statements to the Court.)

THE COURT: Of course, Mr. Bearden and Mr. Lohr, it's not my desire to revoke your probation. These matters so far as I am concerned, are the worst part of my job.

Certainly $550 or $5,500 doesn't necessarily mean the difference between you serving a sentence in prison or being on probation, except this Court previously on October the 8th, 1980, ordered these payments to be made as a condition of your probation.

Now, I know that a lot of times it's hard to find work, and I know that there are times when a person really and truly tries, tried hard, and they can't find the type work that they want, or sometimes they can't find any regular work, but yet, almost daily, people go down to the courthouse in Chattooga County, and I'm sure it's true in this county, looking for somebody to do some work for them, maybe mow their grass, maybe do an odd job for which they would pay them some money. They can't find anybody to work. I don't know where those people are looking for work when people who are looking for somebody to work for them.

[34] I'm assuming in this case that one of the conditions of probation was that the defendant report to the Probation Office periodically.

MR. VAN PELT: Yes, sir. That's in the—in S-1.

THE COURT: In S-1.

MR. VAN PELT: I believe it is. It's the same as on the other one. I may be wrong.

THE COURT: I don't see the condition in this sentence requiring this defendant to report to the probation officer every 30 days, but I believe the testimony of the probation officer was that the terms of the condition of probation were explained to him. Is that the testimony or not?

MR. VAN PELT: Yes, sir, I believe it was.

THE COURT: If there is any dispute about it, we can go back on the record and find out what the testimony was. I don't feel that this defendant has really in good faith reported to the probation officer on any type of regular basis.

Mr. Mullis testified in general terms as to what is generally explained to people on probation, and as I recall it, that this defendant was informed of that. Was that the testimony or not?

MR. LOHR: Your Honor, as I remember it, I'm [35] just—from what I'm trying to recollect, that he generally said that the terms of probation were explained, but he did not go into any detail except with respect to the amount of the fine, and the aspect of reporting to the probation officer.

I don't think there was any testimony that that was one of the conditions of probation, nor that that particular part had been explained to him. I don't remember. I'm just trying to go back and remember.

THE COURT: But, the defendant himself testified that he was given some papers, and that his wife read them to him. Is that not right?

MR. LOHR: I believe that was his testimony.

MR. VAN PELT: Yes, sir. We don't have those papers in evidence. I don't know what the contents of them were. I don't know which papers they were.

Your Honor, I believe that there was testimony from Mr. Mullis that Mr. Bearden was written up at the time of the sentence. I don't believe there was any specific date for reporting testified to.

THE COURT: I know that usually, quote, the papers, end of quote, that are given, usually contain those provisions that they're to report, I believe, every 30 days, but I'm not sure.

Mr. Mullis, would you come back to the witness [36] stand please?

JACK MULLIS,

recalled as a witness at the instance of the State of Georgia, being previously duly sworn, was examined and testified further as follows:

MR. MULLIS: Your Honor, I might clear this up to say, now, he mentioned Mr. Snow. Mr. Snow might have written him up, I don't know, because we both serve this county, but usually everybody that's put on probation, Judge Coker several years ago fixed out some rules of probation, and asked us to read these rules to everybody that's put on probation, which I do.

THE COURT: Do you have a copy of the rules that are given to each person that's put on probation?

MR. MULLIS: Yes, sir.

THE COURT: Do you have a copy of that?

MR. MULLIS: Yes, sir.

THE COURT: Would you get a copy of it?

MR. MULLIS: I sure will.

THE COURT: I reiterate, I don't know what's in probation, but if the prior orders of the Court aren't enforced, then I don't know any other way to do it, if they're not complied with, I don't know any other way, Mr. Lohr.

MR. LOHR: Your Honor, I have been in—since [37] I've been involved with this case, I've been in contact with his family and his brother has told me he would do everything possible to get this amount.

THE COURT: Beg your pardon?

MR. LOHR: His brother has told me that he will do whatever he can to get this $550 to pay it for Danny.

Now, when I spoke with him before today, he indicated he would try to have it today, subsequently found out he was not able to obtain it, and it might be possible that this Court would consider giving Mr. Bearden or his family some time, I don't know how much it would take, a few days, in which to pay this off.

There's no dispute that he has not paid it, and did let it slide, but he's willing to pay it, and his family is willing to pay it as soon as they can get the money.

THE COURT: That's well and good, Mr. Lohr, but, of course, the fallacy in that argument is, since October the 8th, 1980, this defendant has known that on or before February the 8th, he was required to pay this.

I know, and I hate to see $550 or the lack of $550, put this boy in prison. I hate to see anybody [38] go to prison when the jury finds them guilty of armed robbery, I hate to see them go to prison, but those are the laws that you're bound by. I'm bound by the same laws.

So, Mr. Bearden, we all live by laws and not of men, and I don't know any way to enforce the prior orders of the Court but one way.

MR. LOHR: Well, I guess my only response to that, Your Honor, would be that the law requiring revocation of probation when an indigent is unable to pay a fine is an invalid law.

THE COURT: I'm well aware of the indigency provision, and I know that there are times when a person doesn't have funds that he's supposed to have, but in any event, the Court finds that this defendant has failed to abide by the previous order of this Court of Judge Coker on October the 8th, 1980, in failing to pay the amount ordered to be paid by Judge Coker, and in further failing to report to the probation officer periodically.

That's the order of the Court.

MR. VAN PELT: Thank you, Your Honor.

THE COURT: Mr. Bearden, I'm sure, or at least I feel confident that Judge Coker explained to you, and probably Mr. Phillips explained to you at the time [39] Judge Coker imposed this first offender's sentence, what it meant.

Do you care to respond to that, Mr. Lohr?

MR. LOHR: Your Honor, I don't know what Mr. Coker has stated and—excuse me—Judge Coker and Mr. Phillips.

I have conferred with Danny, and I told him that as it stands as if he was at the day of his plea, that this Court would sentence him at this time.

THE COURT: Of course, you weren't here and you don't know what was explained to Mr. Bearden at the time of the sentence.

MR. LOHR: Right.

THE COURT: Now, if in fact, if in fact under the case of Stevens versus the State at 245 Georgia Reports, page 835—would someone go to the library, the law library, here, and get 245 Georgia Reports, under the case of Stevens versus the State—unless it was clearly explained to Mr. Bearden that in the event the provisions of this probation were not complied with, that he could be sentenced in the burglary case anywhere from 1 to 20 years, and in the theft by receiving, anywhere from 1 to 10 years, if that was not explained to him by Judge Coker at the time, or written into the sentence at that time, then, of course, the [40] only period of time by which this Court can now revoke the probation would be the remaining portion. He was given three years sentence on October the 8th, 1980.

Are you familiar with the Stevens case, Mr. Lohr?

MR. LOHR: Your Honor, I'm not. What is the page number?

THE COURT: 835. 245 Georgia Reports, page 835. Our Supreme Court has held that the purpose of the first offender's act is to give the defendant another chance to speak.

In the Stevens case, the judge, the sentencing judge, told the defendant that if he brought—if he violated a term of probation, that he would have to serve the remainder of the sentence if he was brought back into court for violation of the terms of the probation.

All right. Mr. Stevens was in fact brought back into court and resentenced and given a longer sentence than the remainder of his original term of sentence, and our Supreme Court has said, you can't do that.

But, if in fact in this case Mr. Bearden was informed by the Court that if he violated the terms of the first offend-

er's act and was brought back into court, the Court at the time Mr. Bearden was brought back could impose a sentence in the burglary case [41] anywhere from 1 to 20 years, and in the theft by receiving case, anywhere from 1 to 10 years, then, of course, this Court at this time could impose a longer sentence than a period from October the 8th up to the present time.

But, I want to make it clear that between October the 8th, 1980, and up to this date, Mr. Bearden will be given credit for that period of time serving that sentence.

Am I making myself clear or am I confusing you more?

Mr. LOHR: No. I understand exactly what you're saying, I believe.

THE COURT: Mr. Lohr, on behalf of the defendant, do you care to confer with the defendant and then respond, or would you prefer that I have the record checked to determine what information and what statements were made to Mr. Bearden at the time he was sentenced?

MR. LOHR: Your Honor, let me confer with him and see if he recalls what is said.

THE COURT: All right. There is a record of it because at the time Mr. Bearden entered his first offender's plea in each of these cases on October the 8th, 1980, there will be a record of it, and we can [42] get it. I don't know which reporter it would have been, but we can get it.

MR. LOHR: Give me just a moment, If you would, please.

THE COURT: All right, sir.

MR. LOHR: Your Honor, I suppose the only way to be sure is to check the record on it. He does not remember what Judge Coker told him specifically which I can, of course, understand, but he cannot testify one way or the other.

THE COURT: All right. The Court at this time then will impose a sentence which will be the sentence that will stand in the event the Judge at that time, Judge Coker, made the proper explanation to him, which I assume he did.

Then, if it develops that the proper explanation was not given to Mr. Bearden at that time, then I will amend the

sentence and comply with the direction of our Supreme Court in the case of Stevens versus the State at 245 Georgia Reports, page 835.

There are several other cases that hold the same thing as the Stevens case, but that's just one that I happened to remember.

All right. Come around, Mr. Bearden, and Mr. Lohr.
[43] As to Case No. 8917, the State versus Danny Bearden for the offense of burglary, now, Mr. Bearden, you understand I'm now sentencing you to prison, the same as Judge Coker could have done on October the 8th, 1980, do you realize that?

MR. BEARDEN: Yes, sir.

THE COURT: It is the sentence of the Court that the defendant, Danny Bearden, serve a period of five years in the State Penitentiary or such other place or places as the Director of the Board of Corrections directs.

As to Case No.—

MR. VAN PELT: (Interposing) 8923.

THE COURT: Is that 8923?

MR. VAN PELT: Yes, sir.

THE COURT: 8923, State versus Danny Bearden for the offense of theft by receiving, it's the sentence of the Court that the defendant serve a period of three years in the State Penitentiary or such other place or places as the Director of the Board of Corrections directs.

However, Case No. 8923 is to be served concurrent with Case No. 8917. You'll be serving both sentences at the same time.

MR. BEARDEN: Yes, sir.
[44] THE COURT: Now, Mr. Bearden, let me explain to you, you have the right to appeal to our Appellate Courts. If you desire to appeal, you must do so within 30 days from this date, and if you do not appeal within 30 days, then you would lose the right to appeal.

If you desire to appeal and you do not have the funds with which to pay a lawyer to appeal your cases, the Court will appoint a lawyer for that purpose.

You also have a right to seek a review of the sentence in Case No. 8917.

Now, if you desire to seek a review of this sentence, you must do so within 30 days or you would lose that right. Do you understand it?

MR. BEARDEN: Yes, sir.

THE COURT: All right. Do you have any questions that you want to ask me?

MR. BEARDEN: No, sir.

THE COURT: All right, sir. Now, I will ask the Court Reporter to ascertain which court reporter was here on October the 8th, 1980, and go back to these two cases where the pleas were entered, and get an excerpt of that portion of what was told by the Court to Mr. Bearden relative to what would happen to him if he violated any of the laws of the State or country, and was brought back into court.

[45] It's very crucial, that point is very crucial, more crucial to Mr. Bearden than anyone else.

All right. This is the sentence of the Court.

(Hearing concluded.)

In the Supreme Court of the United States

No. 81-6633

DANNY R. BEARDEN, PETITIONER,

v.

GEORGIA

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals of Georgia.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 28, 1982